



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LUIS ANTONIO FLORES-OLIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Cr. No. 11-5033GT
Cv. No. 12-1174GT

ORDER

On May 9, 2012, Petitioner, Luis Antonio Flores-Olivera ("Mr. Flores"), filed a Motion to Modify Sentence, presumably pursuant to 28 U.S.C. § 2255. Mr. Flores requests a two level downward departure based on his status as a deportable alien, which Mr. Flores asserts "should have been considered as a mitigating factor" at his sentencing. The Court has fully considered this matter, including a review of Mr. Flores brief filed, the authorities cited therein and the arguments presented. For the reasons stated below, Mr. Flores Motion to Modify Sentence is **DENIED**.

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1 First, Mr. Flores pled guilty, pursuant to a written plea agreement, to one count of Deported
2 Alien Found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). In the written plea
3 agreement, Mr. Flores explicitly waived his right to appeal and/or collaterally attack his conviction
4 or sentence. The Ninth Circuit has long acknowledged that the terms of a plea agreement are
5 enforceable. *See, United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996), *cert. denied*, 117
6 S.Ct. 1282 (1997). Since Mr. Flores expressly waived his statutory right to appeal or collaterally
7 attack his sentence in his plea agreement, Mr. Flores is now precluded from challenging that
8 sentence pursuant to 28 U.S.C. § 2255. *See, United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.
9 1993) (holding that a knowing and voluntary waiver of a statutory right is enforceable).

10 Moreover, even if Mr. Flores had not expressly waived his right to appeal or collaterally
11 attack his sentence, his petition would still fail. In essence, Mr. Flores argues that because of his
12 status as a deportable alien, he is "ineligible[] for pre-release custody and minimum security
13 confinement." Mr. Flores argues that the Court should grant him a two level downward departure
14 because of his status. However, Mr. Flores argument that the Court should depart downward
15 because he is a deportable alien is precluded by statute and current Ninth Circuit case law. By
16 statute, the Court may depart downward only if there are "aggravating or mitigating circumstances
17 ... not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b).

18 Specifically, the Ninth Circuit has held that the threat of deportation is not a factor that the district
19 court may consider for sentencing purposes. *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737
20 (9th Cir. 1990).¹ Accordingly,

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26 ¹ The Ninth Circuit decided, in an unpublished opinion, that the defendant, like Limon, was not
27 entitled to a six month reduction in his sentence under 18 U.S.C. § 3553(b) because as a
28 deportable alien he is not eligible to spend the last six months of his sentence in a half way
house pursuant to 18 U.S.C. § 3624(c). *See United States v. Zepeda-Valles*, 87 F.3d 1325 (9th
Cir. 1996).

IT IS SO ORDERED.


GORDON THOMPSON, JR.
United States District Judge

Petitioner